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In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GRAY-GRIMES TOOL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

GRAY-GRIMES TOOL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit insofar as it modifies the Board's order.

OPINIONS BELOW

The order of the court of appeals (App. A, *infra*) is reported at 557 F. 2d 1233. The decision and order of the National Labor Relations Board (App. B, *infra*) are reported at 221 NLRB 736.

JURISDICTION

The order of the court of appeals was entered on July 13, 1977. On October 1, 1977, Mr. Justice

Stewart extended the time for filing a petition for a writ of certiorari to and including November 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board, as a remedy for the employer's action in closing part of an integrated operation for anti-union reasons and in refusing to bargain with the union over the effects of that closing on the employees, could properly order the employer to reimburse the employees for the wages they lost from the date of the closing until the employer and the union reached either agreement or a *bona fide* impasse in bargaining.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are:

> Section 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> * * * * *

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> Section 10(c). * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served upon such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *. * * *

STATEMENT

Elway Gray was the president, proprietor, and sole stockholder of Gray-Grimes Tool Company ("the Company"), which made tools and dies for automobile manufacturers and performed "detail work" on automotive parts (App. B, *infra*, pp. 5a-7a; A. 110-111).[1] Gray is also the owner and proprietor of Last Word Sales Company ("Last Word"), the Company's sales representative (App. B, *infra*, pp. 7a-8a; A. 44, 46-47). In June 1974,[2] Local 155, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("the Union") filed a petition with the Board for a representation

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[1] "A." refers to the printed appendix in the court below, a copy of which has been lodged with the Clerk of this Court.

[2] All dates are in 1974 unless otherwise noted.

election among the Company's employees (App. B, *infra*, p. 9a). Prior to the election, Gray, on various occasions, warned his employees that he would close the plant if the Union were voted in (App. B, *infra*, pp. 9a-10a; A. 86, 105, 117). The Union won the ensuing election and on July 26 was certified by the Board as bargaining representative (App. B, *infra*, p. 9a). Thereafter the Company and the Union entered into bargaining negotiations wherein Gray steadfastly met the Union's demand for a "union security" clause with the declaration that he would "close the doors" before he had a union shop (App. B, *infra*, pp. 9a-10a; A. 70, 96, 120-124). Gray finally capitulated, however, and on November 13, initialed a memorandum agreement with the Union containing a union security clause (App. B, *infra*, p. 10a).

Less than two weeks later, on the morning before a scheduled four-day Thanksgiving holiday, Shop Supervisor George Chalmers called a meeting of the employees and asked them whether they would reject the Union if a new election were held in June 1975. The employees responded that they would not (App. B, *infra*, pp. 10a, 14a-15a; A. 72, 99-100). Later in the day, Gray invited the employees to assemble for "a Thanksgiving drink" (App. B, *infra*, p. 10a; A. 73, 89). Referring to his pre-election warning that he would close the plant upon unionization, Gray told the employees, "I understand you fellows are not going to vote the Union out in June so, I'm gonna close right now" (App. B, *infra*, p. 10a; A. 89-90). Gray distributed paychecks for work through that day

(November 27), and announced, "This is it, there is no more Gray-Grimes" (App. B, *infra*, pp. 10a-11a; A. 90). He also stated that Shop Supervisor Chalmers was leaving and that he did not want to run the plant by himself since the employees had voted the Union in (App. B, *infra*, p. 11a; Tr. 118). As he handed a check to employee Gerald Brown, who was the Union's chief steward and one of its three negotiators, Gray "thanked" him for bringing the Union in and putting all his men out of work (App. B, *infra*, p. 11a; A. 73-74).

The Board, adopting the decision of the Administrative Law Judge, found that the Company and Last Word constituted a single employer. The Board also found that Gray continued to operate Last Word after the closing (App. B, *infra*, pp. 7a-9a, 12a).[3] The Board therefore concluded that, "[b]ecause this plant closing involved only a part of a single integrated enterprise, * * * the 'closing' of Gray-Grimes * * * constituted a violation * * * of Section 8(a)(3) and (1) of the Act" (App. B, *infra*, p. 15a).

The Board found that the Company had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), in the following ways: by threatening to close the plant if the Union were selected as the bargaining repre-

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[3] After he closed the Company's plant, Gray entered into a verbal understanding with Twin Bay Industries pursuant to which Twin Bay purchased some of Gray-Grimes' equipment and agreed to manufacture Gray-Grimes' products. Last Word remained in business, to sell these products as well as the products of many other corporations. (App. B, *infra*, p. 12a; A. 54-56).

sentative of the Company's employees; by threatening to close the plant if the Union adhered to its union security proposal; and by blaming the plant's closing on an employee's union organizing activity. In addition, the Board found that the Company had violated Section 8(a)(3) and (1) of the Act by closing the plant for antiunion reasons, and Section 8(a)(5) and (1) by failing to negotiate with the Union about the effects of the closing upon the employees (App. B, *infra*, pp. 19a-20a).

The Board ordered the Company to cease and desist from committing the unfair labor practices found and from interfering "in any other manner" with its employees' organizing and collective bargaining rights under Section 7 of the Act, 29 U.S.C. 157 (App. B, *infra*, pp. 22a-23a). The Board also ordered the Company to bargain collectively with the Union, upon request, concerning the effects of the plant closing upon the Company employees (App. B, *infra*, p. 23a). "[T]o ensure that such bargaining [would] be meaningful," and "to recreate as nearly as possible the economic situation that would have prevailed if [the Company] had not refused to perform its bargaining obligations and had not discriminatorily closed the plant," the Board further ordered the Company to "pay the Gray-Grimes employees backpay, at the rate of their normal wages when last in [the Company's] employ, from the November 27, 1974, date of Gray-Grimes' plant closing until the occurrence of the earliest of the following conditions:" (1) the Company and the Union reach agreement on handling the effects

of the plant closing; (2) the Company and the Union reach a *bona fide* impasse in bargaining; (3) the Union fails to request bargaining within five days of the Board's decision; (4) the Union fails to bargain in good faith; or (5) the Company resumes its Gray-Grimes operation and offers to reinstate its former employees (App. B, *infra*, pp. 20a-21a).

The court of appeals upheld the Board's unfair labor practice findings. Without explanation, however, the court concluded that "the remedy should be modified to provide for payment of backpay to employees only from the date the union shall request the Company to bargain about the effects of the closing on the workers to the time an agreement shall be reached or a bona fide impasse shall occur" (App. A, *infra*, p. 2a).[4]

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's modification of the back pay provision of the Board's order is erroneous and contrary to the decisions of four other circuits which have sustained the Board's authority to provide such a remedy in circumstances similar to those presented here. The resulting conflict of decisions concerns a question of continuing importance in the administration of the National Labor Relations Act—a question of the scope of the Board's remedial authority, the answer to which should not differ from circuit to circuit. Review by this Court is therefore warranted.

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[4] The Board has been advised that the Union requested bargaining shortly after issuance of the Administrative Law Judge's decision (August 1, 1975), and that, according to the Company, an impasse was reached shortly thereafter.

Section 10(c) of the Act, 29 U.S.C. 160(c), empowers the Board, upon finding that a person has committed an unfair labor practice, to enter an order "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *." The Board's back pay order in this case was a reasonable means of "restoring the *status quo ante* to insure meaningful bargaining." *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 216. As the Board stated in *Summit Tooling Co.*, 195 NLRB 479, 481, enforced, 83 LRRM 2044 (C.A. 7), in ordering a comparable remedy in circumstances like those involved here:[5]

> Under the present circumstances, * * * a bargaining order, alone, we are convinced, cannot serve as an adequate remedy for the unfair labor practices committed. The Act requires more than *pro forma* bargaining, but *pro forma* bargaining is all that is likely to result unless the Union can now bargain under conditions essentially similar to those that would have been present had Respondent bargained at the time the Act required it to do so. If the Union must bargain devoid of all economic strength, as it must necessarily do since the Respondent has no need for services of the unit employees, we would perpetuate the situation created by Respondent's [unlawful conduct]. To assure such meaningful bargaining we must, therefore, restore some measure of economic strength to the Union.

[5] In *Summit Tooling*, the Board awarded back pay to all four individuals whose employment was terminated shortly before announcement of the plant closing. The Board did not award back pay to the remaining employees, all of whom were either laid off or transferred to another plant as a result of the closing. See 195 NLRB at 487. Here, all of the Gray-Grimes employees were terminated as a result of the Company's closing. Despite the factual variance between the two cases, the rationale developed by the Board in support of its remedy in *Summit Tooling* is equally applicable here.

Accordingly, until the decision below, every court of appeals that has considered the matter has sustained the appropriateness of the type of back pay remedy provided here in situations where employees have been adversely affected by an unlawful refusal to bargain about discontinuance of part of an operation. This has been so not only where, as here, the refusal has been motivated by anti-union considerations, *e.g.*, *Summit Tooling Co.*, *supra*, but even in the absence of such motivation. *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.*, 361 F. 2d 512, 515 n. 6, 517 (C.A. 5), certiorari denied, 385 U.S. 935, enforcing in relevant part 147 NLRB 788; *National Labor Relations Board* v. *Drapery Mfg. Co., Inc.*, 425 F. 2d 1026, 1028-1029 (C.A. 8), enforcing in relevant part 170 NLRB 1706; *International Ladies' Garment Workers Union* v. *National Labor Relations Board (McLoughlin Mfg. Corp.)*, 463 F. 2d 907, 921 (C.A. D.C.), modifying and enforcing 182 NLRB 958.

The action of the Sixth Circuit in limiting the Board's back pay remedy is in direct conflict with the foregoing decisions. Nor may such a modification be

justified on the ground advanced by the Company in its brief in the court below. In its brief (p. 40) the Company stated:

> The Board now defends the back pay award by contending that it was necessary to restore economic balance between the parties so as to assure meaningful bargaining. In other words, the Board evidently believes that the Respondent would not bargain in good faith over the "effects" unless during bargaining and until occurrence of one of the tolling events, it is incurring back pay liability. Assuming for the moment, the correctness of this reasoning, it would logically follow that back pay should not begin to accumulate until after the Respondent has been requested to bargain, and should continue to accumulate only until the parties reach agreement or reach a bona fide impasse. Any back pay which accumulates either beyond or before this period would not promote meaningful bargaining for the reason that no bargaining was to take place, according to the Board's Order, until a request for bargaining was forthcoming from the Union.

This contention overlooks the fact that the function of the back pay award is not merely to insure that the future bargaining will be in good faith, but to restore the situation, insofar as practicable, to what it would have been had the Company obeyed the law. As the District of Columbia Circuit stated in *International Ladies' Garment Workers Union*, *supra*, 463 F. 2d at 921 (citations omitted):

> The core of the company's violation was its failure to provide the union an opportunity to bargain about its decision to relocate—a failure which caused unit employees to lose their jobs without the protection of good faith bargaining. The Board's order is clearly designed to compensate those employees who were terminated as a result of McLoughlin's unlawful unilateral action. * * * Moreover, the order seeks also to restore the *status quo ante* as far as practicable in the circumstances. Recognizing that meaningful bargaining over the company's decision to relocate is no longer feasible * * *, the Board's order attempts to recreate in some practical manner the situation that would have existed had the company afforded the union an adequate opportunity to bargain over effects. Thus the award of back pay is well suited to remedying the violations found and plainly involves no abuse of the "wide discretion traditionally accorded the Board in fashioning remedies."

See also *Winn-Dixie Stores, Inc.*, *supra*, 147 NLRB at 792.

In this case, had the Company bargained with the Union before terminating the employees, the effects on the employees might well have been ameliorated. The record shows that, at the time Gray precipitously discharged the employees, unfinished work remained in the plant. Indeed, supervisory personnel continued working on pending orders for several months afterwards. (A. 101-102, 74, 91-93.) Nor is it clear that bargaining would have been fruitless. Although Gray was motivated by anti-union animus, the Union had

successfully overcome that situation previously in achieving certain of its contract demands (*supra*, p. 4). In any event, since the Company, by its unfair labor practices, has made it impossible to determine what would have occurred had the Company bargained lawfully, it cannot now be heard to contend that such bargaining would not have resulted in prolonging the employees' tenure.

In view of the conflict of decisions and the fact that the court below, in modifying the Board's order, disregarded the principle that the Board's order shall not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (*Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 540), review by this Court is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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NOVEMBER 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 76-1139

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GRAY-GRIMES TOOL COMPANY, INC., RESPONDENT

July 13, 1977

Before PHILLIPS, Chief Judge, and EDWARDS and LIVELY, Circuit Judges.

ORDER

The National Labor Relations Board applies for enforcement of its order reported at 221 N.L.R.B. 736. Reference is made to the decision of the Board for a recitation of pertinent facts.

The Board found that the Company violated § 8(a)(3) and (1) of the Act in the particulars set forth in its reported decision. The Company also was found to have violated § 8(a)(5) and (1) by not giving the union an opportunity to bargain about the effect on the workers of the closing of Gray-Grimes. Among other things the Company was required to bargain collectively with the Union about the effects of its closing and to pay back wages to Gray-Grimes employees from the date of the closing.

We conclude that the decision of the Board is supported by substantial evidence on the record considered as a whole, but that the remedy should be modified to provide for payment of backpay to employees only from the date the union shall request the Company to bargain about the effects of the closing on the workers to the time an agreement shall be reached or a bona fide impasse shall occur.

Accordingly, it is ORDERED that paragraph 2(b) of the Board's order by modified to read as follows:

> (b) Pay the Gray-Grimes employees backpay, at the rate of their normal wages when last in Respondent's employ, from the date the Union shall request the Respondent to bargain on those subjects pertaining to the effects of the plant closing on its employees until (1) an agreement shall be reached; or (2) until a bona fide impasse in bargaining; or (3) until the Union fails to commence negotiations after its request for bargaining or to bargain in good faith. If Respondent decides to resume its Gray-Grimes operation and offers to reinstate its employees to their same or substantially equivalent positions, its liability will cease as of that date. Backpay will be based on the earnings including fringe benefits which the employees normally would have received during the applicable period less any net interim earnings and shall be computed on a quarterly basis in the manner set forth in *F.W. Woolworth Company*, 90 N.L.R.B. 289, with interest thereon. *Isis Plumbing & Heating Co.*, 138 N.L.R.B. 716.

It is further ORDERED that the order of the Board, as herein modified, be and hereby is enforced. No costs are taxed. Each party will bear its own costs in this court.

APPENDIX B

Gray-Grimes Tool Company, Inc. *and* Local 155, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW). Case 7-CA-11657

November 24, 1975

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

On August 1, 1975, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions [1] of the Administrative Law Judge and to adopt his recommended Order.

[1] For the reasons set forth in fn. 3 of *Summit Tooling Company, et al.*, 195 NLRB 479, 480 (1972), Member Fanning dissents from the failure of his colleagues to find that Respondent violated Sec. 8(a)(5) of the Act by refusing to bargain with the Union over its decision partially to close down its operation.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Gray-Grimes Tool Company, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, Administrative Law Judge: This case was heard at Detroit, Michigan, on May 6 and 7, 1975, based on charges filed December 18, 1974, and a complaint issued February 11, 1974, alleging that Respondent violated Section 8(a)(1), (3), and (5) of the Act. The General Counsel and Respondent have filed briefs.

Upon the entire record in the case,[1] including my observation of the witnesses, and upon consideration of the briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION INVOLVED

Respondent, a Michigan corporation with its office and place of business in Detroit, Michigan, has been

[1] In view of Respondent's opposition, I deny the General Counsel's motion to correct the transcript.

engaged in the manufacture, sale, and distribution of tools and related products for the automobile and associated industries. During the year ending May 31, 1974, it shipped products directly to points located outside the State of Michigan valued in excess of $50,000, and during the same period it distributed products valued in excess of $50,000 to Ford Motor Company, General Motors Corporation, and Chrysler Corporation. I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Charging Party, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Issues*

A threshold issue in this case is whether Respondent, Gray-Grimes Tool Company, Inc., together with Last Word Sales Co., herein called Last Word, constituted a single enterprise. The unfair labor practices alleged are that Respondent (1) discriminatorily closed its Gray-Grimes plant, (2) refused to bargain with the Union, admittedly the employees' statutory representative at all pertinent times, by closing Gray-Grimes without notice to, or bargaining with, the Union, (3) unilaterally discontinued certain employee benefits, and (4) restrained and coerced its employees in various ways because of their union representation.

B. *The Facts and Discussion*

1. Relationship between Gray-Grimes and Last Word

Gray-Grimes is located at 18500 Mt. Elliot in Detroit, with Last Word at 18520 Mt. Elliot; an alley runs between the two buildings. Elway Gray is president of Gray-Grimes and the sole stockholder therein. Gray is also the sole proprietor of Last Word. Gray-Grimes is engaged in two kinds of work, "detail work," which it performs for automotive customers, principally Ford, General Motors, and Chrysler, and product work, for which Last Word receives the orders, but Gray-Grimes produces the product. When Gray-Grimes finishes work on the products, they are taken to Last Word for distribution, packaging, and shipping. The detail work performed at Gray-Grimes is also taken to Last Word, where it is repacked and shipped. Between 75 and 80 percent of Gray-Grimes' business has been detail work. The dollar volume of business between Gray-Grimes and Last Word, consisting of the products manufactured at the former and sold and distributed by the latter, has ranged in recent years from about $12,000 to about $30,000 monthly.

The Gray-Grimes employees number about 17; there are approximately 6 employees at Last Word.[2] Although for some time prior to 1974, Gray had been withdrawing from the active day-to-day supervision of Gray-Grimes, with George Chalmers acting as shop

[2] These figures relate to the period prior to November 27, 1974.

supervisor there, the record is clear that Gray remained in overall charge of Gray-Grimes. It was Gray who engaged in bargaining with the Union; it was Gray who took all personnel actions; and it was Gray alone who determined to close Gray-Grimes (of which more later).

On these facts, I am satisfied that Gray-Grimes and Last Word did, at all material times, constitute a single employer. Essentially, as noted above, Gray-Grimes performs product and detail work, but does not distribute or package its work. Last Word performs these functions for Gray-Grimes, and also acts as Gray-Grimes' sales representative for its product line. The product and detail work are carried across an alley from Gray-Grimes to Last Word, sometimes by Gray-Grimes and sometimes by Last Word employees. And, significantly, Elway Gray is the sole determinant of labor relations policy for both Gray-Grimes and Last Word, as well as being the sole owner of Last Word and the only stockholder of Gray-Grimes. On all these facts, including their contiguous location, it is clear that the two companies are, for practical purposes, a single enterprise. Respondent relies, in arguing that no joint employer relationship exists here, on the Board's decision in *Milo Express, Inc.*, 212 NLRB 313 (1974). The facts of that case, and of *Poole's Warehousing, Inc.*, 158 NLRB 1281 (1966), upon which *Milo* relies, are substantially different from those in the instant case. In both the cited cases, the only significant evidence to support a joint employer or single enterprise con-

clusion was their common ownership. Here, however, we have in addition the exercise of control over labor relations by the "common owner," Gray, the integration of operations described above, and the fact that the two companies are adjacent to each other. I therefore regard those cases as inapposite here.

2. The preclosing events

The Union filed a petition for an election on June 18, 1974, and on July 18, 1974, won the Board-conducted election. The Board certified the Union on July 26, 1974. Before the election was held, Gray asked a group of employees, "When do you want me to close the place, today or Saturday?" and "when do you want me to turn the key in the door, today or tomorrow." The employees were discussing the Union at the time. Gray also told the employees, as he himself testified that he "had too much experience with the Union and I think you will be really making a big mistake if you do it because, if I do have a union, it will not be for very long because there is no way in God's green acres I am ever going to come back and run the company at sixty-two, almost sixty-three years old." Gray also testified that the employees "told the truth about me saying I was not going to have a union." And he admitted posting a sign outside his office door right after the election results were in saying "Thanks a lot fellows, the beginning of the end, July 18, 1974."

About August 15, the Company and the Union began negotiations, meeting some six to eight times.

The "biggest stumbling block" to reaching agreement was apparently Gray's refusal to agree to a union shop. On a number of occasions, he said he "would close the doors before he would have a union shop," and "if we voted for a union shop he would close the plant." James Reeder, who was on the Union's bargaining committee, testified that Gray's opposition to a union shop was because "he did not want it where you had to go to the union hall to hire or bring an employee over." Gray did, however, eventually agree to a union shop, apparently about October 30, and on November 13, he initialed a memorandum of agreement.

On November 27, in the morning, George Chalmers called a meeting of Gray-Grimes employees. He asked them whether, if an election were to be held in 1975, they would vote for the Union or against it. Chalmers also mentioned that business was good, that the company had come from $180,000 in debt to something like $30,000 or $40,000, that orders were coming in and "things were like rosy." At the end of the work shift that same day, Gray called the Gray-Grimes employees over to Last Word, saying "I will buy you a Thanksgiving drink." At Last Word, Gray had the "beginning of the end" sign that he had displayed on the day of the election. He told the employees "As of today, the shop is closed," and "This is it, there is no more Gray-Grimes." Gray also said "I understand you fellows are not going to vote the Union out in June so, I'm gonna close right now." He gave the employees their paychecks, including their pay right

up through November 27. When he gave employee Gerald Brown his check, the last one to receive it, he "thanked" Brown for bringing the Union in and for putting all his men out of work. Gray also stated at one point during this November 27 meeting that "since George was leaving and since we voted the Union in, he didn't want to run the shop by himself." Gray did not pay the employees "vacation pay" for the Thanksgiving period, although he had previously announced a 4-day holiday for them for that period.

Gray did not deny any of the foregoing statements attributed to him by the various employee witnesses, and Chalmers was not called to testify by Respondent. The threats to close the plant if the Union got in, the similar threats with respect to Gray's opposition to a union shop, and telling Brown that he was responsible for the plant closing because he had in effect brought the Union into the plant, are all clear violations of Section 8(a)(1) of the Act, as is Shop Supervisor Chalmers' questioning the employees whether they would vote the Union out if an election were held in 1975. Contrary to Respondent's contention in its brief, I do not find the testimony of the employees to have been "riddled with inconsistencies and contradictions." On the contrary, I found their testimony credible, and, particularly in the absence of any denials by Respondent, to have established the facts as reported above. I do not regard the fact that the Union won the election as militating against a finding of a violation of Section 8(a)(1) prior thereto, nor do I regard the fact that Gray seemed

to have misunderstood the Union's union shop request as a "closed shop" request as negating the threat to close before agreeing to the Union's demand. Finally, I reject Respondent's argument that the context in which Gray's various remarks were made kept them from "attaining the level of threats [or] coercion."

3. The postclosing events

Following the November 27 closing of Gray-Grimes, Gray arranged to have the product work produced by Twin Bay Industries, near Traverse City, Michigan, selling some of its equipment to Twin Bay. Last Word continues to sell the products, now produced by Twin Bay rather than by Gray-Grimes. With respect to the detail work, Gray took no new orders from any of his customers, but arranged that orders already on hand be completed by other companies, at least 15 in number. According to Gray, pursuant to a verbal agreement between Twin Bay and Last Word, Twin Bay produces the various items formerly produced by Gray-Grimes, and bills these items for distribution to Last Word to fill customer orders. Gray indicated that although a few customers that buy these items know that Twin Bay now produces them, it is not necessary that they know, for "80 percent of the bidders I have around United States figured Last Word made them all, they did not know that."

4. Discussion—The plant closing

a. *The contentions*

Based on the foregoing largely uncontroverted facts, the General Counsel alleges that Respondent violated Section 8(a)(5) by closing the plant, and thereafter subcontracting its work to other companies, without notice to the Union, and that by the same closing and subcontracting. Respondent violated Section 8(a)(1) of the Act by virtue of the fact that the closing was motivated by the employees having selected the Union as their collective-bargaining representative.

Respondent, in addition to contending that Gray-Grimes and Last Word are separate and distinct from one another, and do not constitute a joint employer or integrated enterprise, contends that the closing of Gray-Grimes was not discriminatorily motivated, but was rather caused by the desire of Elway Gray "to free himself from the burdens of managing a business which demanded more time than he was willing to give and devote the resulting free time to his long awaited retirement," a decision brought to a head by certain other events, which will be set forth below. Respondent also contends that it was not obligated to bargain with the Union over the decision to close Gray-Grimes, and that it did bargain with the Union over the effects on the employees of the Gray-Grimes' closing, with the Union, having received notification of Respondent's intent, not having requested further bargaining on this matter.

b. *The 8(a)(3) allegation*

It is plain, on the facts found above, that Elway Gray resented the Union. He had resisted it prior to the election, telling employees that he would close the plant if the Union came in, and posting the sign reading "Thanks a lot fellows, the beginning of the end, July 18, 1974," when the Union's election victory became known. He continued, after the election, to mention plant closing, in the context of resisting the Union's demand for a union shop. Finally, on the day of the closing, November 27, Chalmers asked the assembled Gray-Grimes' employees whether they would vote the Union out if an election were held in 1975, and the employees' response to Chalmers that they would not was referred to by Gray when he announced the plant closing at the end of that day. Gray also displayed the "beginning of the end" sign at the meeting announcing the closing; he sarcastically thanked one of the employees for bringing the Union in and putting the men out of work. He also stated that "since George was leaving and since we voted the Union in, he didn't want to run the shop by himself."

Undoubtedly, there were "economic" factors involved in Gray's decision. Some months before, one of his supervisors, Jaster, had been discharged, apparently for profiting from his position without informing Gray. And shortly before, Shop Supervisor Chalmers decided to leave the Company. Finally, Gray had long since formulated semi-retirement plans, involving withdrawing from active management of

the business. It is crystal clear, however, that the retirement plans, and all the other factors, would not have been enough to impel Gray to close the plant on November 27 but for the fact that the Union was "in," and that the employees had indicated to Chalmers that they would not vote the Union "out." In short, Gray's statement to the employees shows that he *was* willing to "run the shop by myself," if he did not also have to cope with a union that was not about to be ousted by the employees as their bargaining representative. Because this plant closing involved only a part of a single integrated enterprise, albeit that one "part" was a corporation and the other part a sole proprietorship, the "closing" of Gray-Grimes therefore constituted a violation by Gray-Grimes of Section 8 (a)(3) and (1) of the Act.

c. *The 8(a)(5) allegation*

The facts of this case show, contrary to Respondent's contention, that it did not notify the Union in any meaningful manner of its intent to close the plant. Respondent asserts as support for its contention that it did notify the Union of various statements made by Gray to the effect that the plant would close if the Union came in, or that the plant would be closed before he would grant a union shop to the Union. This kind of statement, entailing in itself violations of Section 8(a)(1), is hardly notification of a *decision* to close, let alone of a decision to close at any particular time. Nor was a casual remark by

Gray to UAW agent McDevitt[3] to the effect that he had been planning for some time to "move up north," with McDevitt replying to Gray's "What would you do?" with "Mr. Gray, I would move up north," and Gray then saying, "Mr. McDevitt, that's what I am going to do," even close to an appropriate notification to the Union. That Gray planned ultimately to "retire," which was apparently well known to all, again is not a basis for finding that the Union "knew," or should have known, of any decision to close. Indeed, Gray tried up to the last day to find a purchaser—so it is obvious that a "closing" decision was not made, and could not have been told to the Union, prior thereto.

However, the Board has in recent years, as I read the cases, receded from its earlier position that bargaining about the decision to close a plant, or a functional portion of a plant or business, is required in all circumstances. The case most closely resembling the instant case is *Summit Tooling Co.*, 195 NLRB 479 (1972). There, as here, the company that shut down its operations, Summit, was found to be a "single employer" together with the company that remained open, Ace Tool Engineering Co. There, as I have found here, the Board found that the closing of Summit was a "partial plant closing," and that the closing was discriminatorily motivated, and a violation of Section 8(a)(3) and (1) of the Act. However,

[3] I assume for purposes of this contention that Gray correctly identified McDevitt as a UAW agent, although his testimony was only "I believe he was their agent and an organizer."

the Board, reversing the Administrative Law Judge, concluded (*id.* at 480), that the Company did not violate Section 8(a)(5) by closing without giving the Union an opportunity to bargain about the decision to close. The Board stated, "Such decision involved a major change in the nature of the Respondent's business, and, although the closing of the Summit operation could be characterized as a partial plant closing, its practical effect was to take the Respondent out of the business of manufacturing tool and tooling products. The part of the business that remained, Ace Tool Engineering Co., Inc., is not engaged in tool-and-die making, manufactures nothing, and has little relationship to the work which was performed by Summit nor does it utilize the skills of the employees employed by Summit. In these circumstances, to require Respondent to bargain about its decision to close out its manufacturing operation would significantly abridge Respondent's freedom to manage its own affairs. We do not believe that the Act contemplated eliminating the prerogative of an employer as here, to eliminate itself as an employer." In my opinion, one could substitute "Gray-Grimes" for "Respondent" or "Summit," and "Last Word" for "Ace," in the above-quoted portion of the *Summit* decision with virtually complete accuracy.

The General Counsel, in its brief, seeks to distinguish *Summit* on the ground that following the closing, Gray-Grimes subcontracted the detail work that was already on order, and subcontracted the product line work to Twin Bay. I do not regard the admitted

subcontracting of the detail work as in the *Fibreboard* category (*Fibreboard Paper Products* v. *N.L.R.B.*, 379 U.S. 203). It was rather an aspect to closing down Gray-Grimes altogether. As the entire closing was discriminatorily motivated, the subcontracting of this work which remained to be done will be taken into account in fashioning an appropriate remedy. Nor do I regard the continued manufacturing of the product line formerly done by Gray-Grimes by a wholly separate unrelated company, Twin Bay, which purchased some of Respondent's equipment, as a "subcontracting" requiring bargaining with the Union. Even though Last Word still sells the products now manufactured by Twin Bay, the evidence shows that Last Word also sells products manufactured by many other corporations. And the product line at Gray-Grimes amounted only to some 15 percent to 20 percent of Gray-Grimes business; the detail work represented the bulk of its work. For all these reasons, I regard *Summit* as controlling here and find that the cases cited by the General Counsel are distinguishable.[4]

As in *Summit*, of course, the failure of Respondent here to discuss the effects of the shutdown on the terminated employees violated its bargaining obligations under the Act. As already concluded above, I do not regard any of Gray's statements from prior to

[4] The instant case, indeed, may be *a fortiori* to *Summit* in this respect, as here there are at least some considerations other than Gray's resentment of the Union in the picture, whereas there, the Board found "little or no objective record evidence" to support the company's contention that the closing was economic rather than discriminatory.

the election to the eve of the closing as constituting adequate notice to the Union of an intent to close. By the failure to give the Union an opportunity to bargaining about the effect of the closing, Respondent violated Section 8(a)(5) and (1) of the Act.

A final question raised by the complaint concerns Respondent's failure to pay the employees holiday pay for November 28, 1974, which was Thanksgiving day, and is alleged to have been violative of both Section 8(a)(3) and (5) of the Act. In view of the closing of Gray-Grimes the preceding day, I find no violation with respect to this failure to pay, either on the basis of its "unilateral" nature, or on the basis of it having been discriminatorily motivated. Of course, the remedy for the violations found here, including, as shown below, backpay, will cover any holiday pay that the employees normally would have earned, the computation itself being, naturally, a matter for compliance.

Conclusions of Law

1. Respondent Gray-Grimes and Last Word Sales Co., constitute a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By closing the Gray-Grimes plant for discriminatory reasons, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. By failing and refusing to bargain with the Union concerning the effects on the employees of the closing of Gray-Grimes, Respondent has engaged in

unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. By threatening to close its plant if the Union got in, by threatening to close its plant rather than accede to the Union's demand for a union shop provision, and by accusing an employee of being responsible for the plant's closing by bringing in the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act.

Because the violations of Section 8(a)(3) with respect to the plant closing and Section 8(a)(5) with respect to the failure to bargain about the effects of the closing are substantially similar in nature to those found by the Board in *Summit Tooling Co., supra*, I shall follow the Board's example in *Summit Tooling Co.*, and shall not recommend that Respondent be required to reestablish its Gray-Grimes manufacturing operations. However, as in *Summit*, it is essential to require that Respondent bargain, upon request, about the effects of the closing on the Gray-Grimes employees, and that, to ensure that such bargaining be meaningful, to recreate as nearly as possible the economic situation that would have prevailed if Respondent had not refused to perform its bargaining

obligations and had not discriminatorily closed the plant, short of reestablishing the plant. Accordingly, I shall recommend that Respondent pay the Gray-Grimes employees backpay, at the rate of their normal wages when last in Respondent's employ, from the November 27, 1974, date of Gray-Grimes' plant closing until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the plant closing on its employees; (2) a *bona fide* impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. Of course, if Respondent decides to resume its Gray-Grimes operation and offers to reinstate the above employees to their same or substantially equivalent positions, its liability will cease as of that date. Backpay will be based on the earnings including fringe benefits which the employees would normally have received during the applicable period less any net interim earnings and shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon. *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Additionally, as in *Summit*, it is necessary in view of the fact that Gray-Grimes is closed, that Respondent mail to each of the employees as well as post at its Last Word and Gray-Grimes (if the latter is still

open) business locations, copies of the notice to be provided.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER [5]

Respondent, Gray-Grimes Tool Company, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with plant closing if they should select a union to represent them.

(b) Threatening its employees with plant closing if their bargaining representative continued to demand a union shop provision.

(c) Accusing its employees of bringing in the Union, and thereby being responsible for the closing of the plant.

(d) Discouraging membership in Local 155, UAW, or in any other labor organization by closing its plant or in any other manner discriminating against em-

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ployees in regard to hire or tenure of employment or any term or condition of employment.

(e) Failing and refusing to bargain collectively with Local 155, UAW, concerning the effects of the discontinuance of the Gray-Grimes operations on such employees.

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed by Section 7 of the Act, except to the extent that such right is affected by the proviso to Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union concerning the effects of the discontinuance of its Gray-Grimes operation on the employees thereof.

(b) Make whole the Gray-Grimes employees terminated as a result of closing that plant in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail a copy of the attached notice marked "Appendix" [6] to each employee who was employed by

[6] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Rela-

Respondent at its Gray-Grimes operation immediately prior to the discontinuance thereof on November 27, 1974. Copies of said notice, to be furnished by the Regional Director for Region 7, shall be signed by Respondent's duly authorized representative. Thereafter, a copy shall be mailed by Respondent to each of the aforesaid employees, and additional copies shall be posted by it and be maintained for 60 consecutive days thereafter, in conspicuous places at its remaining place or places of business, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations not found herein.

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tions Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Local 155, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) about the effects of our decision to close down Gray-Grimes Tool Company, Inc. on the employees who were affected by such termination.

WE WILL NOT discourage membership in the above-named labor organization, or in any other labor organization, by closing our plant or in any other manner discriminating against our employees in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT threaten our employees with plant closing, or any reprisals, for selecting a union as their bargaining representative or for demands made by a union for a union shop.

WE WILL make our employees whole for any loss of earnings they suffered by reason of our termination of their employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to join or assist any union, or otherwise to engage in union activities.

GRAY-GRIMES TOOL
COMPANY, INC.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 249540 85

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-672

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

GRAY-GRIMES TOOL COMPANY, INC.,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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GRAY-GRIMES TOOL COMPANY, INC.,
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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Gray-Grimes Tool Company, Inc., by and through its attorneys, TRIPP, FREYDL, FRASCO & OLDANI, hereby responds to the Petition of the Solicitor General, on behalf of the National Labor Relations Board, for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit abused its discretion, by a gross misapplication of the applicable standard of review, in modifying the Board's remedy so that back pay would commence on the date of the Union's request for bargaining about the effects of closing on employees and terminate upon agreement or a bona fide impasse.

STATUTES INVOLVED

Respondent concurs with Petitioner's citation of certain sections of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 USC 151, et seq.), but would also cite §10(e) of the Act which provides in pertinent part, that the Courts of Appeals of the United States "shall have power . . . to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the Order of the Board."

STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement but would add the following for the Court's consideration:

First, the Board found that Mr. Gray did not reach a final decision to close Gray-Grimes until the actual day of closing, November 27, 1974. (Petition, App A, p. 16a). Thus, giving the union advance notice of his intent to close would have been impossible.

Secondly, the Board found no *Fibreboard* [*Fibreboard Paper Products* v *NLRB*, 379 US 203, 57 LRRM 2609 (1964)] subcontracting on the part of Gray-Grimes following the closing; and, indeed, the Administrative Law Judge characterized Gray-Grimes' post-closing activities as "an aspect to closing down Gray-Grimes altogether." (Petition, App A, p. 18a). Nor did the Board regard the continued manufacturing of the Last Word product line by Twin Bay as "subcontracting" requiring bargaining with the Union (Petition, App A, p. 18a). The record shows that the agreement between Mr. Gray and Twin Bay was for Twin Bay to produce Last Word products that were formerly produced by Gray-Grimes (A. 23, 28-29, 53-54). Thus, Mr. Gray's decision to close Gray-Grimes' operation was final and he did not resume operations at a later date at the same location or elsewhere.

In addition, the record reflects that there was no further contact between Mr. Gray and the union after closing. No request for bargaining was made and no demands on behalf of the employees were submitted to Mr. Gray to test his willingness to discuss such matters (A. 124).

Other pertinent matters not reflected in the record are the following: On August 5, 1975, Mr. Steven Yokich, business representative of the union, made a written request to Mr. Gray to bargain regarding the effects of plant closing pursuant to the Administrative Law Judge's recommendations (Petition, App A, p. 23a). The company agreed and sessions were conducted on August 14, and August 17, 1975. On the latter date, an impasse was reached. Respondent's Counsel furnished minutes of

these sessions to Mr. David L. Basso, compliance officer of the National Labor Relations Board's Detroit office. Presumably, Petitioner is basing its footnote 4 on page 7 of its Petition ["4The Board has been advised that the union requested bargaining shortly after issuance of the Administrative Law Judge's decision (August 1, 1975), and that, according to the company, an impasse was reached shortly thereafter"] on the information supplied Mr. Basso. Obviously, the above information regarding bargaining is not part of the record since the events occurred in the wake of, and as a result of, the Administrative Law Judge's decision. However, the question of discretionary review precedes a consideration of the merits. Respondent feels that it is appropriate to inform the Court that ultimately the parties did bargain to an impasse over the effects of closing.

ARGUMENT

A. Considerations governing review on Writ of Certiorari of Court of Appeals decisions granting or denying National Labor Relations Board Orders.

Rule 19(1) (b) of this Court cites among the reasons for which review on Writ of Certiorari may be granted the situation "where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . . or had decided an important question of federal law which has not been, but should be, settled by this court. . . ." The Solicitor General has obviously patterned his Petition in conformance with the above.

However, the companion cases of *NLRB* v *Pittsburgh SS Company*, 340 US 498, 95 L Ed 479, 71 S Ct 453 (1951); *Universal Camera Corp.* v *NLRB*, 340 US 474, 95 L Ed 456, 71 S Ct 456 (1950), appear to have narrowed this Court's scope of discretionary review of court of appeals decisions granting or denying labor board orders.

In the *Pittsburgh SS Co.* case, the Court said at 95 L Ed 482,

> . . .Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of labor board orders. "The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari. . ." Taft Hartley Act §10(e), 61 Stat 148, ch 120, 29 USC (Supp III) §160(e).
>
> Certiorari is granted only "in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Layne and Bowler Corp* v *Western Well Works*, 261 US 387, 393, 67 L Ed 712, 714, 43 S Ct 422; Revised Rules of the Supreme Court of the United States, Rule 38(5).

Justice Frankfurter, after discussing the applicable standard of review of Board orders before the Courts of Appeals, stated in the *Universal Camera Corp.* case at 95 L Ed 469:

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

The ultimate question before the Court appears to be whether the Sixth Circuit abused its discretion, by a gross misapplication of the applicable standard of review in modifying the Board's Order. Before reaching that question, it would appear that the Court must determine first that the issue is one of public importance and, secondly, that there is a real and embarrassing conflict of opinion and authority on the question among the courts of appeals.

B. The Solicitor General has failed to demonstrate that a "real and embarrassing conflict of opinion and authority" exists between the instant decision of the Sixth Circuit and the other court of appeals decisions cited.

The Solicitor General cites four cases as conflicting with the instant decision of the Sixth Circuit. They are: *NLRB* v *Drapery Mfg. Co.*, 425 F2d 1026, 74 LRRM 2055 (CA 8, 1970) enforcing in part 170 NLRB 1706, 68 LRRM 1027 (1968); *International Ladies Garment Workers Union* v *NLRB (McLoughlin Mfg. Corp.)*, 463

F2d 907, 80 LRRM 2716 (CA DC, 1972), modifying and enforcing 182 NLRB 958, 74 LRRM 1756 (1970); *Summit Tooling Co.*, 195 NLRB 479, enforced, 83 LRRM 2044 (CA 7, 1973); *NLRB* v *Winn-Dixie Stores, Inc.*, 361 F2d 512, 62 LRRM 2218 (CA 5, 1966), certiorari denied 385 US 935, enforcing 147 NLRB 788, 56 LRRM 1267 (1964). Admittedly, the Board's back pay orders in *Winn-Dixie and Summit Tooling* differ from the modified order of the Sixth Circuit in the instant case. There is, however, no conflict with regard to any issue of substantive law. Furthermore, there are important factual distinctions between the *Summit Tooling* and *Winn-Dixie* decisions and the instant case which justify the difference in remedies. On the other hand, the remedies provided in the *Drapery* and *Garment Workers* decisions are in accord with the Sixth Circuit's modification.

In *NLRB* v *Drapery Mfg. Co., Inc., supra*, Drapery Manufacturing, a manufacturer and installer of drapery, was found by the Board to be a single integrated employer along with American White Goods Co. Drapery Manufacturing terminated its operations on April 21, 1967, without advance notice and without an offer to bargain with the union over the closing or the effects of closing, 425 F2d 1027. Some four months later, the company belatedly offered to bargain with the union regarding the effect of closing upon the employees, 425 F2d 1028. While holding that Drapery Manufacturing was not obligated to bargain regarding its decision to close, the Eighth Circuit affirmed the Board's bargaining order regarding the effects of closing and its back pay order which ran from the date of closing, April 21, 1967, to the date the company offered to bargain over effects, August 1, 1967. This is a rather different remedy than that involved in the *Summit* and *Winn-Dixie* Decisions, to be

discussed *infra*. In those cases, and in the instant case, the Board ordered back-pay from the date of closing until either agreement, impasse, failure of the union to request bargaining within a specified time or the failure of the union to bargain in good faith. Implicit in the *Drapery* decision is the notion that it would have been inequitable and punitive to require back pay subsequent to the date the company stood ready and willing to bargain. Consequently, the Board fashioned its back pay remedy to fit the unique circumstances of the *Drapery* case. The Petition of the Solicitor General, on the other hand, seems to argue for the imposition of a uniform back-pay remedy applicable to all partial closing cases.

International Ladies Garment Workers Union v *NLRB (McLoughlin Mfg. Corp.), supra*, involved an Indiana manufacturing company which, in April of 1965, informed the union of its "irreversible decision to go out of business." At that time, unbeknownst to the union, the company was negotiating to relocate its plant to Alabama. The company went ahead and bargained with the union over the effects of the closing on its Indiana employees. By May of 1965, the company had made a firm decision to relocate, but the union remained in the dark until September of 1965 when the company finally admitted to the union its plans to relocate.

On these facts, the Board ordered the company to bargain regarding the effects of relocation and made the following back-pay order, at 74 LRRM 1760:

> Ordinarily, as set forth in *Winn-Dixie*, back-pay would not terminate until a future bargaining impasse. In the present case, however, the union learned of the transfer of operations by early September of 1965 but did not seek to bargain with the Respondents about the transfer or its effects. In these circumstances, we believe that it is equitable to terminate back pay at about this date, which we shall fix for convenience sake as September 1, 1965, rather than the usual impasse date.

The D.C. Circuit enforced the Board's order regarding the obligation to bargain over McLoughlin's decision to relocate and the effects of relocation on its employees, but modified the back-pay order by beginning liability on April 6, 1965, the date when the company falsely informed the union that it had made an irreversible decision to go out of business. The Circuit Court, however, affirmed the cut-off date for back pay liability which the Board had determined to be the time when the union learned of the transfer of operations in early September of 1965 but did not seek to bargain with the company about the transfer or its effects. It is mystifying that the Solicitor General could find this remedy similar in type to the Board's back-pay remedy in the instant case. It has far more in common with the modified remedy provided by the Sixth Circuit which commenced back-pay liability on the date the union, after long

silence, finally requested bargaining. In both decisions, equity and the particular circumstances involved determined the ultimate remedy, not an inflexible formula which the Solicitor General would apply in all circumstances involving partial closing.

The back-pay order in *NLRB* v *Winn-Dixie Stores, Inc., supra*, is identical to that provided by the Board in the instant case, i.e. it orders back pay from the date of plant closing until agreement, impasse, failure of the union to request bargaining, or failure of the union to bargain in good faith. The severity of the remedy in *Winn-Dixie* appeared to be due to the fact that the company had effectively refused to bargain for nearly five years from the time the union presented authorization cards in 1961. An earlier decision of the Board, 138 NLRB 1355, enf 324 F2d 502 (CA 5, 1963), had found *Winn-Dixie* guilty of 8(a) (1) and 8(a) (5) violations during the election campaign. The Company refused to comply with the Board's certification and bargaining order and discontinued operations shortly before the Union filed with the court of appeals for enforcement. The latter decision dealt with refusal to bargain while the court of appeals was considering the Board's earlier action.

The Solicitor General would have us believe that the refusal to bargain in *Winn-Dixie* was not motivated by anti-union animus. However, the Board stated at 56 LRRM 1267 in comparing the *Winn-Dixie* decision to another Board decision:

> Finally, there was no indication of Union animus on the part of the employer in that case. This case is different. Here, we have an employer, who, by its past conduct, has given evidence of its opposition to the policies of the Act.

Respondent contends that the intransigence and extended refusal to bargain make the *Winn-Dixie* case unique, as is indicated by the fact that the Board, although overturned by the Court of Appeals, had ordered the extreme remedy of bargaining regarding the resumption of the discontinued operation, 56 LRRM 1268.

The Solicitor General finally cites *Summit Tooling Co., supra*, a case which is similar, but only superficially similar, to the instant case. *Summit* also involved the closing of a tool manufacturing company that was found to be a "single employer" along with a parent company which remained open. Also, the Board issued a back-pay order patterned after the *Winn-Dixie* formula.

In *Summit*, however, there was clear evidence to the effect that the union had made a request for bargaining prior to the plant closing which was denied by the company. The Board stated at 79 LRRM 1399:

> As Milovich (the Company President) had indicated to Schaunaman (a former employee) on June 8, Summit closed its operations. No notice was given to the Union of Summit's intention to close its operation. However, around the beginning of June, the Union representative had been informed by some unit employees about the possible closing of the operation. After receiving this information, the representative asked for a meeting with Milovich, saying, among other things, that there were a lot of things to be discussed if it were true that Summit was going to close its operation. Milovich replied that he could meet with the representative only in early July.

Referring to the same June 8 incident, the Court of Appeals said at 83 LRRM 2047:

> On that date, Milovich explained to Parks (another former employee) that no obligation remained on his behalf to the laid off men and he would not meet with the Union on this matter because no men were left.

Thus, in *Summit*, the company denied a clear request for bargaining regarding the effects of closing. In the instant case, the Board admits, at page 11 of its Brief to the Sixth Circuit, that the union did not request bargaining until it had been ordered to do so by the decision of the Administrative Law Judge on August 1, 1975, some 8 months after the plant closing.

Of the four decisions cited by the Solicitor General as being in conflict with the decision of the Sixth Circuit in the instant case, only *Summit Tooling* and *Winn-Dixie* conflict, and there the conflict is limited to the remedial portion of the decisions. The Solicitor General cannot maintain that there is any conflict in the substantive law between the instant case and the other decisions which he cites. All reach basically the same conclusion: that an employer, in a partial closing situation, is required to give the union advance notice of its intention to close down and an opportunity to bargain regarding the effects of closing upon the employees. The decision of the Sixth Circuit in the instant case [Appendix A, Petition, p. 2(a)] reached the same conclusion by affirming the Board's finding of an 8(a) (5) violation. The Sixth Circuit's modification of the Board's back-pay remedy does conflict with the formula set forth in *Winn-Dixie* and *Summit Tooling*, but respondent contends that this is not the sort of "real and embarrassing conflict of opinion and

authority" that would justify review on writ of certiorari. Rather, the conflict reflects the long standing Board policy that remedies should be adapted to the circumstances of the individual case, *Ozark Trailers, Inc.*, 161 NLRB 561, 63 LRRM 1265, 1270 (1966).

Other Courts of Appeals have recognized that the Board's remedy should be flexible and patterned in response to the particular circumstances involved. In *NLRB* v *Royal Plating and Polishing Co.*, 350 F2d 191, 60 LRRM 2033 (CA 3, 1965), the Third Circuit denied enforcement of back-pay and bargaining orders, 148 NLRB 59, 57 LRRM 1006, 152 NLRB 76, 59 LRRM 1141. On June 14, 1963, Royal Plating closed down one of its Newark, New Jersey plants without giving the union prior notice and an opportunity to bargain. The Court agreed that the employer was obligated to bargain over the effects of closing but held that there was insufficient evidence to determine whether Royal Plating's conduct amounted to an unfair labor practice. The Court said at 350 F2d 197:

> We direct the Board's attention to events that may have transpired since June 14, 1963. As we read the record, the Union made very little effort to bargain in respect to the effects of the shut-down after the Company's decision was transmitted to the Union. Furthermore, the Company asserts in its Brief that it has continued to bargain "with respect to such questions as were raised by the Union." While these facts, if they be supported by evidence, would not necessarily remedy the refusal to bargain, they, considered with other relevant circumstances, may present a situation in which effectuation of

> the purposes of the Act might not require a remedial order even though there has been a technical violation of the act. *New York Mirror, Division of the Hearst Corp.*, 151 NLRB 110, 58 LRRM 1465 (1965).

On remand, the Board determined that Royal Plating had violated §8(a) (5) of the Act by refusing to bargain over the effects of the plant closing, and it issued the following back-pay order at 63 LRRM 1049:

> In order to recreate as nearly as possible the economic situation that would have prevailed if the Respondent would not have refused to perform its bargaining obligations in 1963, and in order to effectuate the policies of the Act in the labor dispute before us, it is our considered judgment that the Respondent should be ordered to pay its Bleeker Street employees amounts at the rate of their normal wages when last in Respondent's employ, from the date of this Supplemental Decision (September 8, 1966), until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing on employees of the Bleeker Street plant, (2) a bona fide impasse in bargaining; and (3) the failure of the Union to request bargaining within five (5) days of this Supplemental Decision, or to commence negotiations within five (5) days of the receipt of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any employee exceed the amount he would have earned as wages from June 14, the day on which respondent terminated the Bleeker Street operations, to the time he secured equivalent employment elsewhere, or August 31, 1963, whichever occurred sooner. We believe that the limited wage payment period specified above, which cannot be protracted by the Union through dilatory bargaining practices, assures a remedial order which is tailored to the needs of the situation presented and does not impose an undue or unfair burden upon the Respondent.

The August 31 date referred to above is the date when Royal Plating closed down its other Newark plant and terminated its operations completely, 63 LRRM 1046. The above Order is nearly identical to the one formulated by the Sixth Circuit in the instant case. That remedy ran from the date that the union requested the company to bargain about the effects of closing until agreement, impasse, failure of the union to commence negotiations after its request, or failure to bargain in good faith (Appendix A, Petition, page 2A).

C. The Solicitor General has failed to demonstrate that the issue involved is of importance to the public as distinguished from that of the parties and has further failed to show that the Sixth Circuit either misapprehended or grossly misapplied the applicable standard of review.

Layne and Bowler Corporation, supra, stands for the proposition that certiorari will be granted only in cases of general public importance and not where import is confined to the parties. At issue in the instant case is one

method of computing back-pay liability pursuant to a Board finding of an §8(a) (5) violation. No substantive rule of law in the field of labor-management relations is involved. The issue is solely remedial. The Board ordered back-pay from the date of closing of Respondent's plant, and the Sixth Circuit modified that order by pushing back the commencement of liability to the date when the Union finally requested bargaining. The Sixth Circuit does not elaborate on its reasons for the modification. Section 10(e) of the Labor-Management Relations Act gives to the Courts of Appeals the power to "enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." Given the applicable standard of review, one must assume that the Sixth Circuit determined that the Board's remedy did not effectuate the policies of the Act.

Although it has repeatedly affirmed the Board's wide discretion as to remedies, this Court has also made it plain that:

> This is not to say that the Board may apply a remedy it has worked out on the basis of experience, without regard to the circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the act. *NLRB* v *Seven-Up Bottling Co.*, 344 US 344, 349, 73 S Ct 287, 97 L Ed 377 (1953).

Further, the Court's analysis of the remedial provisions of the Act in *Republic Steel Corporation* v *NLRB*, 311 US 7, 11 through 12, 85 L Ed 6, 61 S Ct 77 (1940) is still applicable today.

> This language [Section 10(c) of the Act] should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he has engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such order." We have said that the power to command affirmative action is remedial, not punitive. *Consolidated Edison Co.* v *NLRB*, 305 US 197, 83 L Ed 126, 59 S Ct 206 (1938). See also *NLRB* v *Pennsylvania Greyhound Lines*, 301 US 261, 82 L Ed 831, 58 S Ct 571 (1937). We adhere to that construction.

It was Respondent's argument before the Sixth Circuit that back pay should not begin to accumulate until such time as the union requested bargaining and should continue to accumulate only until agreement or bona fide impasse. Respondent further argued that any back pay which accumulated either beyond or before this period would fail to promote meaningful bargaining for the reason that no bargaining was to take place, according to the Board's original order, until a request for bargaining

was forthcoming from the union. Back pay from the date of Respondent's closing, distribution of tens of thousands of dollars to Respondent's employees, would not promote meaningful bargaining over the effects of closing. It would merely be an attempt by the Board to penalize Respondent for certain unfair labor practices which were found.

The Sixth Circuit, in modifying the Board's Order, was merely exercising its statutory authority under §10(e) of the Act. In so doing, it determined that the Board's order was a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act, *NLRB* v *Seven-Up Bottling Co., supra*, at 346-347. There is nothing to indicate that the Sixth Circuit misapprehended or misapplied that standard of review.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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